Supreme Court, U.S.
FILED
APR 2 2002

No. 01-1273

In The Supreme Court of the United States

SOUTHERN MANUFACTURED HOMES, INC. and HORTON HOMES, INC.,

Petitioners,

v.

SCOTT BROOKS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION FOR RESPONDENT

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REASONS FOR DENYING THE WRIT

I. HORTON NEVER ARGUED TO ANY STATE COURT THAT ITS CERTIFICATE OF QUALITY ASSURANCE IS NOT A WRITTEN WARRANTY.

A. Horton Did Not Preserve the Issue of Whether Its Certificate of Quality Assurance is a Written Warranty.

Horton argues that the Alabama Supreme Court erred by holding that the Certificate of Quality Assurance is a written warranty under the Magnuson Moss Act. Under Supreme Court Rule 14.1(g)(i), Horton was required to state in its petition "when the federal questions sought to be reviewed were raised [and] the method or manner of raising them . . . ." *See Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997).

Horton's Statement of Facts does not contain this information. Horton argues, "Plaintiff never alleged at trial, and never argued on appeal, that the 'Certificate of Quality Assurance' amounted to a written warranty under the Magnuson-Moss Warranty Act. The Supreme Court of Alabama made this finding on its own behalf." Pet. at 9 n.8.

Notwithstanding this, Horton was required to present, *at some point*, its contention that the Certificate of Quality Assurance is not a written warranty. Horton could have preserved this issue in its Application for Rehearing. *See, e.g., Herndon v. Georgia*, 295 U.S. 441, 444 (1935) ("[T]he federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it.").

Yet, Horton does not allege that it *ever* presented this issue to any Alabama court, and the opinion of November 30, 2001, does not reflect that Horton raised the issue on rehearing. Horton now seeks to raise an issue that it never raised in any state court. This it may not do. *See In re Estate of Wilson*, 439 U.S. 877, 879 (1978).

B. The Alabama Supreme Court Correctly Held that the Certificate of Quality Assurance Is a Written Warranty.

Under section 2301(6) of title fifteen, a writing delivered in connection with the sale of a consumer product is a "written warranty" in three circumstances:

> (1) if it "affirms or promises that such material or workmanship is defect free," or
>
> (2) if it "affirms or promises that such material or workmanship . . . will meet a specified level of performance over a specified period of time," or
>
> (3) if it contains an "undertaking in writing . . . to refund, repair, replace or take other remedial action . . . . "

See 15 U.S. C. § 2301(6).

The Certificate of Quality Assurance is a written warranty for two reasons. First, it states that "your new home has been *carefully inspected* to ensure quality and cleanliness." Pet., App. F, at 1f. This statement "affirms . . . that such material or workmanship *is defect free*." In *Marine Midland Bank, N.A. v. Carroll*, 471 N.Y.S.2d 409, 98 A.D.2d 516 (1984), the court held that a

"Dealer's Pre-Delivery Inspection Requirements" form was a written warranty under the Magnuson Moss Act.

Second, by stating that the home is "built for a lifetime," the certificate "affirms or promises that such material or workmanship . . . will meet a specified level of performance *over a specified period of time*." The Federal Trade Commission has recognized that the word "lifetime" is a reference to the duration of a warranty. *See Rules, Regulations, Statements and Interpretations under the Magnuson Moss Warranty Act*, 49 Fed. Reg. 60168, 60181-82 (1975); 16 C.F.R. § 239.4 (2001); *cf. Skelton v. General Motors Corp.*, 660 F.2d 311, 316 n.7 (7th Cir. 1981) ("[A] representation that a 'transmission would perform like a THM transmission *for the life of the transmission*' would constitute a 'written warranty.'"), *cert. denied*, 456 U.S. 974 (1982).

C. Horton Issued a Written Warranty and Was thereby Prohibited from Disclaiming Implied Warranties.

Without regard to whether the Certificate of Quality Assurance is a Magnuson-Moss warranty, the petition shows on its face that Horton issued a written warranty, Pet., App. D, at 20d. Under the express language of section 2308(a) of title 15, this warranty rendered Horton's disclaimer of implied warranties ineffective.

The practice of issuing a limited warranty while simultaneously disclaiming implied warranties, such as Horton did, is one of the primary evils that the Magnuson Moss Act was designed to remedy:

> [T]he bill is designed to insure consumers certain basic protections when they purchase

> consumer products which have written warranties.... The issuance of a limited warranty while simultaneously disclaiming implied warranties has become an increasingly common practice which results in many cases in a document which could be more accurately described as a limitation on liability rather than a warranty. *Therefore, there is a need to prohibit the disclaimer of implied warranties when a supplier of consumer products guarantees his products in writing.*

Sen. Rep. 93-151, 93d Cong., 1st Sess. 7; *see* 119 Cong. Rec. 968 (1973) (similar remarks by Congressman Magnuson in introducing the bill); *Final Action Concerning Review of Interpretations of Magnuson-Moss Warranty Act*, 64 Fed. Reg. 19700, 19704 (1999) ("Protection of the consumer's implied warranty rights is the bedrock of the Magnuson-Moss Warranty Act regulation scheme.").

II. HORTON NEVER ARGUED TO ANY STATE COURT THAT FEDERAL LAW REQUIRED FINDINGS OF FACT OR THAT FEDERAL LAW EXCUSED IT FROM OBJECTING TO SPECIFIC PORTIONS OF PLAINTIFF'S FEE REQUEST.

A. Horton Did Not Preserve the Issue of Whether the Alabama Supreme Court Improperly Deemed the Fee Request Uncontroverted.

The Alabama Supreme Court held that Horton had not preserved the issue of whether the fee award was excessive, stating, "Horton Homes bore the burden of objecting to specific items or charges for amounts of

work that it considered improper, and when it declined to identify any work or expense that it considered unnecessary, the trial court could properly treat those amounts as uncontroverted."[1] Pet., App. A, at 20a. Failure to preserve an error is an adequate and independent ground for a state court judgment. *Adams v. Robertson*, 520 U.S. 83, 87 (1997).

Horton argues, however, that federal law prohibited the Alabama Supreme Court from requiring it to object to specific items in the fee request. Pet. at 18. The Alabama Supreme Court did not address this argument, and Horton does not allege that it ever presented this argument to any Alabama court. Thus, this issue is not preserved for review. Sup. Ct. R. 14.1(g)(i); *Adams v. Robertson*, 520 U.S. 83, 86-88 (1997).

B. Horton Failed to Preserve the Issue of Whether Federal Law Required the Trial Court To Make Findings of Fact.

Horton further contends that the trial court erred by failing to make written findings of fact on the plaintiff's fee request. Pet. at 20. The Alabama Supreme Court did not address this argument, and Horton has

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[1] Horton disclaimed any contention that counsel had padded his hours, stating, "I don't believe there's any question that Houston Howard applied that much time on an hourly basis to this case. Mr. Howard is not going to come into this court and pad his time records or his hourly rate or the expenses. That's not an issue here." (R. 930). When the court asked Horton's counsel, "You don't contend that any of those depositions or any of the discovery was inappropriate under the allegations of the case," Horton's counsel refused to identify any discovery that it thought was unnecessary. (R. 932-33).

not alleged that it raised this issue in any Alabama court. Sup. Ct. R. 14.1(g)(i); *Adams v. Robertson*, 520 U.S. 83, 86-88, 89 n.3 (1997). Thus, this issue is not preserved for review.

Moreover, although the court in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), said that "the *district court* [should] provide a concise but clear explanation of its reasons for the fee award," the award was not made by a *district court*. Unlike the *Federal Rules of Civil Procedure*, the *Alabama Rules of Civil Procedure* do not ordinarily require trial courts to make written findings of fact. *Compare* Fed. R. Civ. P. 52(a) & 54(d)(2)(C) *with* Ala. R. Civ. P. 52(a) & 54. Nothing in *Hensley* requires *state courts* to make findings of fact, and nothing in the Magnuson Moss Act requires such findings.

C. The Trial Court Did Not Abuse Its Discretion in Finding that the Plaintiff's Different Claims Were Not Distinct in All Respects.

A court is not required to reduce a fee request simply because a plaintiff failed to prevail on every issue raised:

> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. *Normally this will encompass all hours reasonably expended on the litigation,* and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

In refusing to reduce a fee request, the court in *Drouin v. Fleetwood Enterprises,* 209 Cal. Rptr. 623, 627, 163 Cal. App. 3rd 486 (Cal. App. 3rd Dist. 1985), said, "Plaintiffs' complaint clearly discloses that all of her causes of action were related to her purchase of the motor home from defendant and her subsequent efforts to obtain repairs of its defects." *Accord, Chrysler Corp. v. Weinstein,* 522 So. 2d 894, 896 (Fla. App. 3rd Dist. 1988); *Fleetwood Motor Homes of Pennsylvania, Inc. v. McGehee,* 182 Ga. App. 151, 355 S.E. 2d 73 (Ga. App. 1987); *Universal Motors, Inc. v. Waldock,* 719 P.2d 254 (Alaska 1986).

Horton did not identify for the trial court, and has not identified here, any work for which plaintiff's counsel should not have been compensated. The trial court did not abuse is discretion in determining that the plaintiff's claims for negligent/wanton construction, negligent/wanton repair, and fraud were not "distinct in all respects from [the plaintiff's] successful claims." 461

U.S. at 439. In this case as in *Drouin,* all of the plaintiff's "causes of action were related to [his] purchase of the . . . home from defendant and [his] subsequent efforts to obtain repairs of its defects." 209 Cal. Rptr. at 627. This is sufficient to sustain the trial court's action.

III. THE ALABAMA SUPREME COURT CONDUCTED MEANINGFUL REVIEW OF THE PUNITIVE DAMAGE AWARD, REDUCING THE AWARD FROM $600,000 TO $150,000.

A. Horton Did Not Preserve the Issue of Whether the Constitution Required the Trial Court To Make Written Findings of Fact.

Horton argues, "For some unknown reason, however, the Alabama Supreme Court in this case did not remand to the trial court pursuant to *Hammond* even though these petitioners urged it to do so." Pet. at 28. Horton has not cited any portion of the record showing how it raised this alleged constitutional error. Sup. Ct. R. 14.1(g)(i); *see Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997).

The Alabama Supreme Court opinion makes no reference to Horton's alleged contention that the court should have remanded the case for findings of fact. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Adams*, 520 U.S. at 86.

Under Alabama law issues not raised in an appellant's initial brief are waived. *Goodyear Tire & Rubber Co. v. Washington*, 719 So. 2d 774, 778 (Ala. 1998); *Kennesaw Life & Acc. Ins. Co. v. Old Nat'l Ins. Co.*, 291 Ala.

752, 754, 287 So. 2d 869, 871 (1973) (court will not consider issue first raised in reply brief). Horton's initial brief failed to argue that the trial court's order was deficient because it contained no written findings of fact. Thus, this issue was waived.

B. Horton Had No Constitutional Right to Written Findings of Fact.

Horton argues, "[T]he trial court did not reflect in the record its reasons for refusing to cut the punitive damage award, and made no findings whatsoever regarding the *Gore* and *Green Oil* factors." Pet. at 28. Although the trial court made no written findings, it held a lengthy hearing where it considered the relevant factors. (R. 910-27). In *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 466 (1993), this court said, "We certainly are not prepared to characterize the trial judge's failure to articulate the basis for his denial of the motions for judgment notwithstanding the verdict and remittitur as a constitutional violation." That same reasoning applies here.

C. Horton Received Meaningful Appellate Review.

Finally, Horton contends, "Nor did the Alabama Supreme Court conduct any type of *meaningful* review of the punitive award." Pet. at 28. The record contradicts this assertion; the court reduced the punitive award from $600,000.00 to $150,000.00. The right to meaningful appellate review does not entail the right to a written opinion. *Cf. Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 363 (1932) ("There

would certainly have been no denial of due process if the court, in affirming the judgment, had rendered no opinion. . . . ").

This court has recognized two constitutional grounds for challenging punitive damages awards. First, a tortfeasor is entitled to reasonable notice of the sanction that may be imposed. *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 584-85 (1996). Second, "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor." *Id.* at 562.

"[T]he notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 465-66 (1993). Prior decisions gave Horton notice that a mobile home manufacturer may receive a substantial sanction for wrongful conduct. *See Vintage Enterprises, Inc. v. Jaye*, 547 So. 2d 1169 (Ala. 1989) (affirming $500,000 punitive damage award against mobile home manufacturer), *cert. denied*, 493 U.S. 959 (1989).

As to the amount of the sanction, the decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), disposes of any argument that the sanction itself is unreasonably large. There, this court affirmed what it viewed as a likely punitive damage award of $840,000, based on an economic loss of less than $4,000, and a likely mental anguish award of $196,000. *Id.* at 8, n. 2, & 23-24. Although the Alabama Supreme Court determined that Brooks' economic loss was $12,000, and his

total loss $150,000, Pet., App. A, at 26a, the court reduced the punitive damages to only $150,000.

Last, Horton states, "The bottom line in this case is that Horton has asserted from the beginning that punitive damages were unwarranted in this case. . . . To date, there has been no finding by any court as to what Horton did or failed to do to warrant the imposition of punitive damages." Pet. at 30. The Alabama Supreme Court opinion does not address Horton's alleged contention that the evidence did not warrant an award of punitive damages. Again, this issue was not properly presented to the Alabama Supreme Court; Horton failed to file any Motion for Judgment as a Matter of Law on the plaintiff's claim for punitive damages during trial.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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